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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 406

WILHELMINA SUMI,
Petitioner,
vs.
ALSIE M. YOUNG,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to Review a Judgment Dismissing an Appeal from Alaska.

BRIEF FOR RESPONDENT.

STATEMENT.

Respondent Alsie M. Young had been appointed by the will of decedent, Mayme Helen Young, as testamentary guardian of decedent's minor children, under Sections 4515, 4516, 4531, Alaska Compiled Laws 1933 (hereinafter set out at length infra pp. 16, 17). The will having been probated, said respondent applied to the Probate Court (U. S. Commissioner) in Alaska for an order fixing bond as per said sections. The Com-

(NOTE): All italicizing is the writer's. Stars indicate omission of irrelevant matter.

missioner over the objection of one Wilhelmina Sumi, grandmother of the minors, made an order approving said appointment and fixing bond. The grandmother appealed to the District Court for Alaska—Division No. 4, and on the hearing, that Court affirmed said action of the Commissioner; whereupon the grandmother appealed to the United States Circuit Court of Appeals for the Ninth Circuit. Said last mentioned Court, on preliminary motion of respondent, dismissed the said appeal for want of jurisdiction—there being no showing that the matter in controversy had any pecuniary value. The matter comes here on certiorari granted by this Court on November 9, 1936.

The question involved here is as to whether the motion for dismissal of the appeal should have been sustained, or whether said motion should have been denied and the appeal heard on the merits.

The motion to dismiss the appeal was on these grounds, viz.:

1. No question arises under or involves the Constitution of the United States of America.

2. No question arises under or involves any statute or treaty of the United States or any authority exercised thereunder.

3. No monetary value, exclusive of interest and costs, exceeding one thousand dollars ($1000.00) is in controversy herein.

4. The appellant herein was not a party in the Probate Court, Fairbanks Precinct, Alaska, where this proceeding originated, and has no standing in this Court.

CONTENTIONS.

PETITIONER in support of her contention that the appeal should not have been dismissed relies upon the provisions of Sections 4571, 4572, 4573, 4574, Alaska Compiled Laws 1933 (hereinafter set out in full, infra p. 6).

RESPONDENT contends:

A. That the reasons for the dismissal of the appeal, as set forth in the opinion of the Circuit Court of Appeals, copy of which is attached to the petition for certiorari, are sound and cogent; and, in this regard, further that the said provisions upon which petitioner relies have been repealed, so far as concerns appeals to the Circuit Court of Appeals, by the Act of Congress of 1925—same being 28 U. S. C. A. Section 225 (hereinafter set out in substance, infra pp. 13, 14, 15).

B. That petitioner had no appealable interest and that for this, if for no other, reason it was proper to dismiss the appeal.

DISCUSSION.

A.

APPELLATE JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

The jurisdiction of said Court to entertain appeals from the judgments of Alaska Courts is set forth in 28 U. S. C. A. Section 225, pp. 294-295, reading as follows:

Sec. 225 (*Judicial Code,* Section 128, amended) Appellate Jurisdiction.

(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal and writ of error final decisions.

First. * * *

Second. * * *

Third. In the district courts for Alaska or any division thereof * * * "in all cases civil and criminal wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; *in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000* * * * and in all habeas corpus proceedings."

also appellate and supervisory power in bankruptcy proceedings (see 28 U. S. C. A., p. 294, Section 225, sub. c)—also in habeas corpus.

We are unable to see that this statute confers upon ~~this~~ Court jurisdiction to review by appeal the decision of the Alaska Court made in the instant matter.

Certainly it will not be contended that the Constitution or any treaty of the United States is involved—and it is evident also that the matter is neither a habeas corpus nor in bankruptcy.

Equally obvious is it that no statute of the United States nor any authority exercised thereunder is in question. In this regard we have to say: Prior to March 3, 1899, the laws of Oregon, civil and criminal,

so far as applicable, were in force in Alaska, and on the last mentioned date, the Congress provided a Criminal Code for Alaska (30 Stat. 1267), and on June 6, 1900, a Political Code and Code of Civil Procedure for the Territory. (31 Stat. 321.) The said Criminal Code (being laws and regulations for the Territory) was held to exclude United States laws, with reference to criminal procedure in the Territory (*Summers v. United States,* 231 U. S. 92, 34 Sup. Ct. 38, 58 Law. Ed. 137); and by the same reasoning, the Act of June 6, 1900 (31 Stat. 321), providing Codes of Civil Procedure, in which is included our Probate Code, is special legislation for the Territory, and the said law in no sense is a law of the United States generally, or a statute thereof, within the meaning of the statute conferring jurisdiction of appeals from the District Courts of Alaska upon the United States Circuit Court of Appeals in cases where a "statute or treaty of the United States" is involved.

It is true that the Act of 1900 is a law of the United States in the sense that it was enacted by Congress. But nevertheless said Act was enacted by Congress *acting as a local legislature for Alaska,* and it is not a general law of the United States in the sense of the third subdivision of (a) of §225 U. S. C. A.; for if it is to be so considered then there would be no occasion to provide in said subdivision for "in all other cases".

Remains then to be considered only this question, viz., Is the decision which is sought to be reviewed a decision "in a civil case wherein the value in controversy, exclusive of interest and costs exceeds

$1000''? and the Supreme Court of the United States has several times answered *in the negative* the same or analogous questions.

Barry v. Mercein, 5 Howard 103, 12 L. Ed. 712;
DeKraft v. Barney, 2 Black 704;
Kurtz v. Moffett, 105 U. S. 487, 29 L. Ed. 458;
In re Burrus, 136 U. S. 586, 34 L. Ed. 500;
Sims v. Sims, 175 U. S. 162, 44 L. Ed. 115.

BUT PETITIONER CLAIMS that, notwithstanding the provisions of 28 U. S. C. A. Section 225, the appeal in question here is authorized by provisions of Sections 940, 941, 942, 943 ch. 786 of said Act approved June 6, 1900 (31 Stats. 480)—irrespective of the amount involved in the controversy. Said provisions so relied on by petitioner were carried into and became Sections 1772, 1773, 1774, 1775, respectively, of Compiled Laws of Alaska 1913 (a Congressional Compilation) and Sections 4571, 4572, 4573, 4574, respectively, of Compiled Laws of Alaska 1933 (a Territorial Compilation)—said Sections so relied upon read as follows:

"Chapter Ninety
of Appeals in Probate Cases.

"Sec. 940. *Appeals to district court.* There shall be an appeal to the district court of the district of Alaska from all orders of the commissioners exercising the jurisdiction of a court of probate.

Sec. 941. *Exceptions and orders of commissioner.* In the case of decedents any heir, legatee, devisee, creditor, or other person interested in the estate, and in the case of minors, lunatics, and

habitual drunkards, any creditor or relative within the third degree of consanguinity, may file with the commission exceptions to any order of such commissioner granting or revoking letters of administration or of guardianship; allowing semiannual or final accounts; allowing or rejecting claims; directing the payment of debts or legacies, or the distribution of estates; ordering the sale or disposal of real or personal property, or other proceeding. Upon the filing of such exception the commissioner shall make a transcript of all files, papers, and evidence pertaining to such order or proceeding and forward the same to the clerk of the district court.

Sec. 942. *Duty of district judge.* Upon the filing of such exceptions the district judge shall proceed on due notice to hear and determine the same at such time and in such manner as he shall prescribe by order, and for that purpose may receive and entertain affidavits and depositions or hear oral evidence.

Sec. 943. *Proceedings in such cases.* Upon such hearing the district court or judge thereof shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit, which order shall be entered in a docket to be kept by the clerk of the court for that purpose, properly indexed, and a copy of the same shall be forwarded to the commissioner before whom the exceptions were filed, who shall thereupon proceed in accordance with such order. *Such orders shall be deemed a judgment subject to appeal in the manner provided for appeals from judgments in the district court.*"

IN THIS REGARD IT IS PERTINENT to review briefly the germane legislation relating to the Circuit Court of Appeals:

I. The Act of Congress establishing the U. S. Circuit Court of Appeals (Act of March 3, 1891—26 Stats. 828) was entitled.

> "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes."

The subject of appeals from Alaska is not *specifically* mentioned in this Act, but Section 15 of the Act provided that the Circuit Court of Appeals

> "shall have the same appellate jurisdiction, by writ of error or appeal to review the judgments, orders and decrees of the Supreme Courts of the *several territories* as by this act they may have to review the judgments, orders and decrees of the district court and circuit court" etc.

Alaska not then being an organized territory, the question soon arose as to whether or not an Alaska Court which had been established by the Act of May 17, 1884 (23 Stats. p. 24), could be considered to be the Supreme Court of a territory. The said query was answered *in the affirmative,* by the decision of the Supreme Court of the United States in the case of *The Steamer Coquitlam v. United States* (163 U. S. 346, 41 L. Ed. 184—April 20, 1896).

II. The said Act of 1884 was crude and deficient in many respects, but notwithstanding, Alaska managed to get along until 1899 and 1900, when extensive gold

discoveries and increasing population induced Congress to give Alaska a Criminal Code and a Civil Code. The said Civil Code is the said Act of 1900. (31 Stats. 321.) In the interim between the dates of the two acts (i. e., in 1891), the Circuit Court of Appeals had been established.

Section 504 of said Act of 1900 provided as follows:

> "Sec. 504. *Appeals and writ of error, how taken.* Appeals and writs of error may be taken and prosecuted from the final judgments of the district court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; *and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars* the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court."

III. The next Act to be considered is the Act of March 3, 1911 (36 Stats. 1133)—being the Act establishing the Judicial Code.

The title is:

> "An act to *codify, revise* and *amend* the laws relating to the judiciary."

The enacting clause reads:

> "Be it enacted that the laws relating to the judiciary be, and they hereby are *codified, revised and amended,* with title, chapters, head notes and sections, entitled, numbered and *to read as follows.*"

And then follows this, viz.:

Chapter One—District Courts, Organization—(Sections 1 to 23). * * *

Chapter Two—District Courts, Jurisdiction—(Sections 24 to 28). * * *

Chapter Three—District Courts Removal of Causes —(Sections 28 to 39). * * *

Chapter Four—District Courts—Miscellaneous provisions—(Sections 40 to 67). * * *

Chapter Five—District Courts—particular States, (Sections 69 to 116). * * *

Chapter Six—CIRCUIT COURTS OF APPEAL.

Section 116. Establishes nine judicial circuits.

Section 117.

> "There shall be in each circuit a circuit court of appeals (which shall consist of three judges of which two shall constitute a quorum) with *appellate jurisdiction* as hereinafter *limited and established.*"

Sections 118 to and including 134 contain nothing of interest to the question under discussion.

Section 134.

> "In all cases other than those in which a writ of error or appeal will lie direct to the Supreme

> Court of the United States as provided in Section 247, in which the amount involved or the value of the subject matter in controversy shall exceed *five hundred dollars* (and *in all criminal cases*) writs of error and appeal shall lie *from the District Court of Alaska,* or from any division thereof to the Circuit Court of Appeals and the judgment orders and appeals shall be final in all such cases."

IT IS TO BE NOTED that the language of Section 117 is this, viz.:

> "There shall be in each Circuit a circuit court of appeals * * * with appellate jurisdiction *as hereinafter limited and established.*"

and then follows the "limitations" just referred to; and among those limitations is the limitation contained in Section 134 of said act—by which jurisdiction of appeals of civil cases from Alaska is confined to appeals of cases "in which the amount involved or the value of the subject matter in controversy shall exceed five hundred dollars or more".

This act was passed 11 years after the Act of 1900 re appeals from Alaska in probate cases on which petitioner relies; and the omission in the said Act of 1911 of those provisions of said Act of 1900 which refer to appeals in probate matters necessarily denies the validity of appeals in such cases except when the value of the matter in controversy exceeds five hundred dollars; for, otherwise, such provisions would be absolutely repugnant to that clause of said Act of 1911 which prescribes that the Circuit Court of Ap-

peals is to have appellate jurisdiction *"as hereinafter limited and established"*. Here is an express affirmative limitation and it "implies negative words".

Durusseau v. U. S., 6 Cranch 307;
Railroad Co. v. Grant, 98 U. S. 398, 401.

In all the acts conferring jurisdiction on the Circuit Courts of Appeals, Congress is of course legislating for a Federal, not a local Court; and, too, it is legislating for a Court created by Congress—for a Court with jurisdiction prescribed and prescribable by Congress alone. And so when Congress expressly *limits the jurisdiction* of such a Court, the limitation must, perforce, be of universal application—unless there be in the limiting act some expression providing that the limitation shall not extend to the exercise of jurisdiction in some specified case or matter—and we look in vain for any such "unless" or "except" clause in this Act of 1911; and the act shows on its face that Congress had in mind appeals from Alaska.

IV. Coming now to the Act of February 13, 1925 (43 Stats. 936) amendatory of the Judicial Code: the title is:

> "An Act to amend the Judicial Code and to *further define* the jurisdiction of the Circuit Courts of Appeal and of the Supreme Court, and for other purposes."

and the enacting clause is:

> "Be it enacted * * * that Sections 128, 237, 238, 239 and 240 of the Judicial Code as now existing be, and they are severally, *amended and re-enacted to read as follows:*

(a) The Circuit Courts of Appeals shall have jurisdiction to review by appeal and writs of error final decisions

First * * *

Second * * * In the United States District Courts for *Hawaii* and *Porto Rico in all* cases.

Third. In the District Courts for *Alaska* or any division thereof and for the *Virgin Islands* in all cases civil and criminal where * * *; in all other civil cases wherein the value in controversy exclusive of interest and costs exceeds $1000 * * * and *in all habeas corpus proceedings;* and in the district court for the *Canal Zone* in the cases and mode prescribed in the Act approved Sept. 21, 1922, amending prior laws relating to the Canal Zone.

Fourth. In the *Supreme Courts* of the Territory of *Hawaii* and *Porto Rico* in all civil cases wherein, etc.

Fifth. In the United States Court for *China* in all cases.

(b) Review of interlocutory orders

First * * *

Second * * *

(c) Appellate and supervisory jurisdiction in bankruptcy proceedings.

(d) * * * Appeals from bankruptcy courts in *Alaska* and *Hawaii* to go to Circuit Court of Appeals 9th; from *Porto Rico* to go to Circuit Court of Appeals 1st; from the *Virgin Islands,* to the 3rd; from the *Canal Zone* to the 5th.

(e) Jurisdiction over Federal Trade Commission, Interstate Commerce Commission, Federal Reserve Board.

We look in vain for some expression in the Act of 1925 which points to any exception to the limitations of jurisdiction expressed in the Act. On the contrary, on consideration of the contents of the Act it will be seen that Congress took in the "whole sweep" of appellate jurisdiction; i. e., appeals from Courts on the mainland as well as from territorial Courts, Alaska, Hawaii, Porto Rico, Virgin Islands, Canal Zone, China, etc.

Congress is presumed to have had before it all the law in force on the subject of the jurisdiction of the Circuit Courts of Appeal. It certainly had before it all the laws relating to appeals from Alaska because it "picks and chooses", re-enacting some items,—as for instance the provision for appeals in *habeas corpus,*—changing other items, as for instance raising the requirement as to the amount in controversy from $500.00 to $1000.00, expressly providing for appellate jurisdiction in bankruptcy proceedings, *and entirely omitting* to mention some other items, as for instance, appeals from orders in Probate. As the last above mentioned items are omitted from the revisory act which "further defines" the jurisdiction of the Circuit Court of Appeals, it is apparent that Congress intended to relegate said items to the limbo of abandoned items, except of course when the value of the matter in controversy exceeds $1000.00.

Petitioner's position is that that portion of Sections 941, 942, 943 of the Act of 1900 (supra pp. 6, 7) which relates to appeals to the United States Circuit Court of Appeals from orders of the Probate Court in Alaska in appointing a guardian, is still in force—notwithstanding the said Acts of 1911 and 1925. But the same sections of the said Act of 1900 purport also to allow appeals from orders of the Probate Court allowing or rejecting a claim against an estate, and directing the payment of a debt, and appeals from an order approving an accounting in an estate and in appeals from an order distributing an estate to heirs or legatees—and this would be true, even though the allowed or rejected claim, or the debt, or the amount accounted for, or the amount distributed, should be as small as $10.00 or even less.

Any construction which by any chance might precipitate upon the Circuit Court of Appeals a mass of appeals on such inconsequential matters ought, if reasonably possible, to be avoided.

The section relied upon by petitioner was repealed by implication, because the Act of 1911 and 1925 cover the entire subject.

Murdock v. City of Memphis, 20 Wallace 590, 616-617.

B.

PETITIONER (APPELLANT) WAS NOT A PARTY AND HAD NO APPEALABLE INTEREST.

We think it is manifest that the provision for appeals in guardianship appointments which is mentioned in said Sections 941, 942, 943 of the Act of 1900 has no reference to appointment of *testamentary guardians.*

The Probate Court does not make appointment of a testamentary guardian, such appointment is made solely by the will of the testator. The right of a parent to appoint by will a guardian for his child, is of purely statutory origin—the progenitor of such statutes being 12 Car. II c 24. This statute allowed such right to the father but not to the mother. Originally the Oregon statute followed the parent statute, by granting to the father, but withholding from the mother, such right of appointment (*Ingalls v. Campbell,* 18 Oreg. 461, 24 P. R. 904—Dec. 1889), but the amendment of 1889 gave the right to the mother also (Oregon L. 1891, Sec. 1, p. 87); so, continuously thereafter the Oregon law was, and it now is, as follows:

> "Every father may, by his last will in writing, appoint a guardian or guardians for any of his children whether born at the time of making the will or afterwards, to continue during the minority or for a less time. And every mother may, by her last will in writing, appoint a guardian or guardians for any of her children, to continue during the minority of the child or for a less time: Provided, the father of said child or children is dead and has not appointed a guard-

ian, or wherever by judgment of divorce, the custody of such child or children has been awarded to the mother; and every such testamentary guardian shall have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed by the County Court. Provided nothing in this section shall be construed to deprive either the surviving father or mother of the custody of the person of his or her children, such surviving parent being competent to transact his or her own business."

1 Oregon Code (1930), Sec. 11, 1307.

"Every such testamentary guardian shall give bond in like manner and with like conditions as is before required of a guardian appointed by the County Court. Provided when the testator in a will appointing the guardian shall have ordered or requested that such bond shall not be given the bond shall not be required, unless from a change in the situation or circumstances of the guardian or for other sufficient cause, the County Court shall think proper to require it."

1 Oregon Code Annotated (1930), Sec. 11, 1308.

ALASKA: The statute of Alaska re testamentary guardians was lifted bodily from the Oregon law, the only difference being that in the Alaska statute the word *commissioner is substituted for the words "County Court"* where said words appear in the Oregon statutes.

(Alaska Compiled Laws 1933, Secs. 4515, 4516, 4531.)

And, so, the adjudications of the Oregon Court, prior to the adoption by Alaska of the Oregon statute, are of course of great weight, if not absolutely controlling.

The Oregon Court, speaking of the statute (12 Car. 11 c 24), which conferred upon the father the right of testamentary appointment of a guardian, said (in 1899):

> "The power *thus conferred* when exercised to its fullest extent *invested* the testamentary guardian with an authority over the children, and control of their estates almost as coextensive as that enjoyed by the father himself. His appointment supersedes all other guardians, and all control on the part of the mother. So absolute is this power that it may be exercised in utter disregard of the claims of maternal affection and despite its protests, and commit the custody of the children to a stranger, and embitter the life of the mother by depriving her of the custody of her offspring. It matters not how amiable and refined she may be, how competent in every respect to direct the education and to participate, at least, in the custody of her children, the *paramount right of the testamentary guardian* deprives her of all right to interfere with his custody of them or their education. Said *Lord Chancellor* Cottenham:
>
> 'It is proper that mothers of children thus circumstanced, should know that they have no right as such to interfere with testamentary guardians, and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in

respect of the right in that mother, but it is in consequence of that power which the court has of controlling the power of testamentary guardians.' ''

Ingalls v. Campbell (Oreg.), 24 P. 904.

This case is valuable here as showing that a Court of chancery might, but that no other person or tribunal could, thwart the wishes of the deceased father who had made a testamentary appointment under that parent statute. Of course, much of said decision is valueless now, on account of the fact that the Oregon statute has been amended so as to confer upon the mother the right to make a testamentary appointment in case of the death of the father, intestate. However, all that part of the decision which expounds the history, nature, characteristics and limitations of a testamentary appointment, are as applicable and cogent where the appointment is rightfully made by the mother, as they would be if the appointment had rightfully been made by the father. Certainly, then, *if the mother* had no standing to object as against a testamentary appointment made by the father *before* the amendment, *the grandmother* has no standing to object as against a testamentary appointment made by the mother *after* the amendment.

THE FACT IS THAT A TESTAMENTARY GUARDIAN "IS DISTINGUISHED from guardians at common law, because instituted by statute, and *on the other hand from guardians under judicial appointment because they take their authority under appointment by the father*". *(The American Law of*

Guardianship—Woerner, p. 42, Section 15.) In *Norris v. Harris,* 15 Cal. 226, Judge Field (in January, 1860, at p. 256 of the report) said:

> *"Nor is it necessary, under our statute, that any letters of guardianship should issue to authorize the guardian to act.* The order of appointment, *when made by* the *Probate Court,* constitutes the authority, *and the Will, in case of testamentary appointment, that of guardians in other cases.*
>
> (Note: The California statute of which the Judge was speaking, is substantially the same in this aspect as the Oregon-Alaska statute; and it is to be found at page 488, Vol. 1, General Laws of California, 1850-1864. Theodore M. Hittell.)"

In Volume 1 of Abbott's Probate Law, at page 171, Section 184, it is said that "No petition or notice of his appointment is necessary to be filed or given" (referring to testamentary guardians). It is true that the author refers to the Nevada Code (Nev. 560; see Comm. Cd. Sec. 11).

> "Many of the forms of guardianship recognized at common law have ceased to exist and *only three forms* are now generally recognized, viz.: natural or parental guardianship, *testamentary* guardianship *and* guardianship by judicial appointment."
>
> 4 *Bancroft's Probate Practice,* Sec. 1257, p. 2016;
>
> *Lord v. Hough,* 37 Cal. 657, 668.

The function, then, of the commissioner, under the statute, is *not to appoint* a guardian, but *simply to fix*

the amount of the bond to be required of an already appointed guardian. Such action of the commissioner is committed to his discretion, and if he allows anyone to have a "say in the matter" his act is in *"grace"* but is not in recognition of any *"right"*. Also in the case at bar the Commissioner essayed to "approve the appointment" and to issue letters of guardianship, but there is no statute requiring or authorizing any such action on the part of the Commissioner, as the appointment had already been made by the testator and the fitness of the testator's choice *ipso facto* passed upon.

THE APPELLANT, THEREFORE, IS NOT A PROPER OR LEGAL PARTY TO THESE PROCEEDINGS, AND HAD NO APPEALABLE INTEREST.

No process of the Probate Court, or any other Court, made her such. Neither was she made a party by order or rule of any Court, and especially she was not made a party by any order of the Probate Court of the Fairbanks Precinct, Alaska. She thrust herself into the original proceedings as an objector or protestant. She was, in the eyes of the law, a stranger to those proceedings. The order made by the Probate Court did not invade her legal rights.

The word "party" in its reference to a litigant in Court bears a well-defined legal significance and at no time in the proceedings in the Probate Court or in the District Court was, or at the present time is, the appellant to be considered a party to the proceedings

in the sense that it entitles her to prosecute an appeal to any Court from any order made in these proceedings.

In *Black's Law Dictionary,* 2nd Ed., p. 878, the word "party" is stated to be:

> "* * * a technical word and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or equity; the party plaintiff or defendant * * * and all others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties."

The same authority also says:

> "The term 'parties' includes all persons who are directly interested in the subject-matter in issue, who have a right to make defense, control the proceedings, or appeal from the judgment. Strangers are persons who do not possess these rights."

47 *Corpus Juris,* p. 14, on this subject, Section 1, col. 2, says:

> "The words 'party' and 'parties', when used with reference to suits or actions, are technical words of precise meaning unless it is apparent that they are used in a more popular sense."

3 *Corpus Juris,* p. 616, states the general rule to be as follows:

> "As a general rule, as we shall see in the following sections, the right of appeal is limited to persons (1) who were parties to the action or proceeding, or to the judgment, order, or decree appealed from, (2) who have an interest in the

subject matter or controversy, and (3) who are prejudiced or aggrieved by the decision."

This is a proceeding begun in the Probate Court to fix the bond of a testamentary guardian. There are no parties to the proceeding except the petitioner making the application to have his bond fixed. The petitioner is merely conforming to the requirements of the law in making such application, and the only person interested in the proceeding besides himself is the Probate Judge.

3 *Corpus Juris*, p. 619, states the following:

"In many jurisdictions there are statutes allowing any 'party' aggrieved by a judgment, order, or decree, either generally or of the probate or other particular courts, to appeal therefrom. Under these statutes, as a rule, any person may appeal if he was an original party to the action or proceeding, or if he was afterward brought in as a party, or if he is a party or privy to the judgment, order, or decree complained of, provided he is interested and aggrieved. On the other hand, it is generally held that, to be entitled to appeal, one must have been a party to the action or proceeding blow, or must be a party or privy to the judgment, order, or decree appealed from. If he was not a party originally, he must have made himself a party afterward by some appropriate action, or must have been made a party to the judgment, order, or decree, or must be privy thereto. In some jurisdictions, however, the term 'party' in the statute authorizing appeals from probate or orphans' courts has been construed, not in the technical sense as necessarily importing a litigant before the court in the pro-

> ceeding in which the judgment, order, or decree was rendered, but as including any one on whose interest it has a direct tendency to operate injuriously."

The mere matter of the fixing of the amount of the guardian's bond in no sense can be said to operate injuriously upon the so-called appellant here. To her it was a matter of utter indifference what amount was fixed by the Probate Court as the amount of the bond of the guardian, and that was the only subject matter of the proceeding before the Probate Court. The mere filing of a "Protest" by the so-called appellant in the Probate Court did not make her a party upon the record in those proceedings.

An appeal can be taken only by a party to the record. This is the well settled general law. See *Harrison v. Nixon,* 9 Peters 483, 9 Law. Ed. 201. In this case the Court said:

> "The only parties the Court can know are those in the record. They can not permit counsel who represents parties who may think themselves interested, not in the record, to come in and interfere."

In *Fisher v. Hanna,* 21 Colo. 11, 38 Pac. 421, it was held that a party taking an appeal must have been on the record below. The Court said:

> "It is well settled that to enable one to prosecute an appeal or writ or error, he must be a party to the record in the trial court."

In the case of *Williamson v. Hays,* 25 W. Va. 613, the Court said:

> "It is well settled that a person who is not a party to the proceedings in the court below, in which the judgment complained of is rendered, can not obtain a writ of error to this court from the judgment of the court below."

The Court in that case further held that:

> "To entitle any person to obtain a writ of error or appeal from a judgment, he must be both a party to the cause and aggrieved by the judgment."

The right of the testamentary guardian, Alsie M. Young, to have the Probate Court for the Fairbanks Precinct fix the amount of his bond was an absolute right with which Wilhelmina Sumi was in no way concerned, either in the Probate Court or in the District Court, and she had no standing in either Court to object to the authorized procedure in conformity with the existing law conferring authority on the Probate Court to require of a testamentary guardian a bond in the same manner and with like conditions as is required by the statute of a guardian appointed by the Commissioner. Whatever her rights may have been, she clearly had no right to protest against the exercise by the Probate Court of its proper functions under the law in fixing the bond of a testamentary guardian under a probated will whose validity has never been challenged.

CONCLUSION.

We urge then that the action of the Circuit Court of Appeals in dismissing petitioner's appeal should be affirmed.

Dated, December 28, 1936.

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